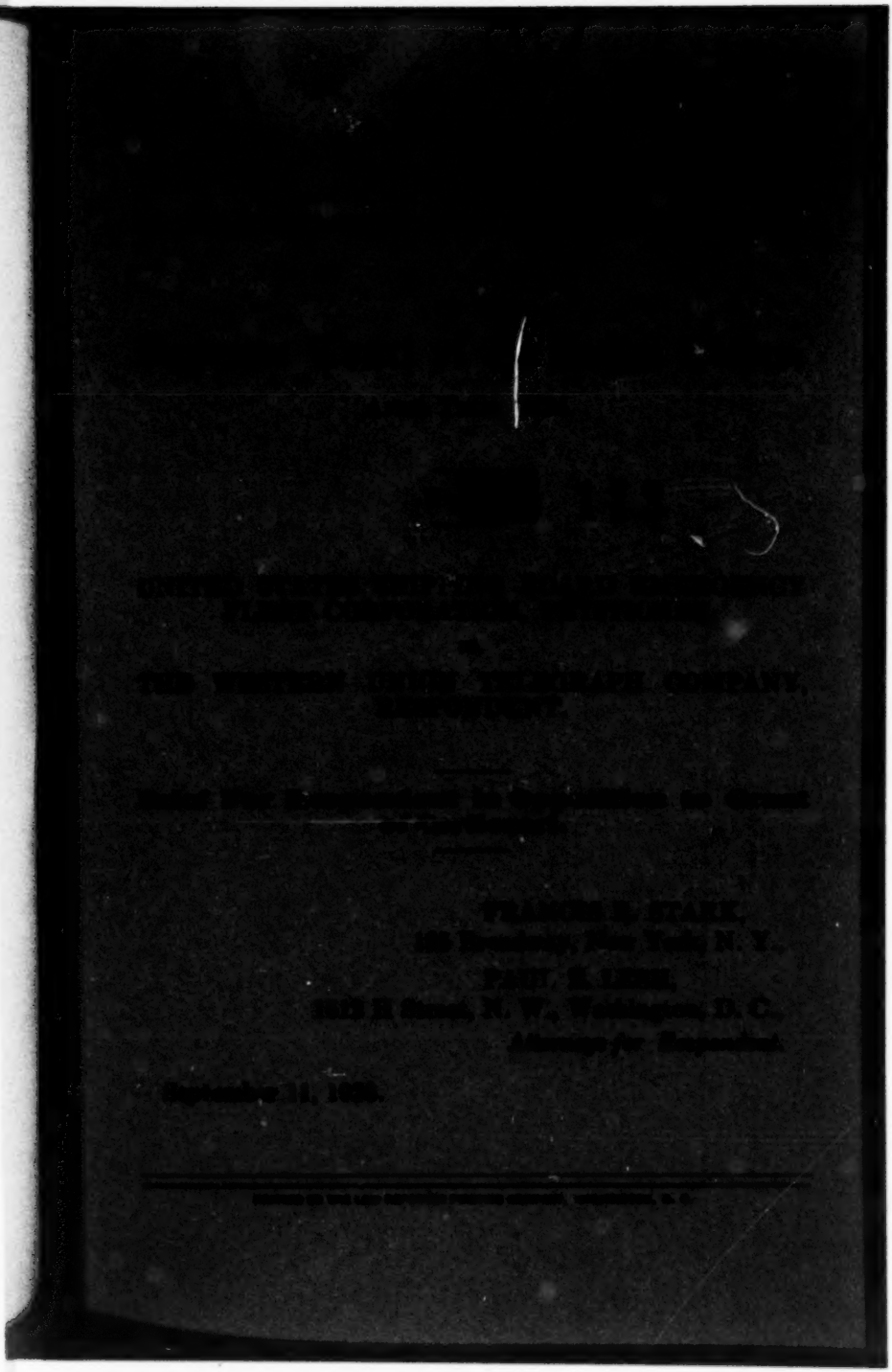

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IN THE

Supreme Court of the United States

APRIL TERM, 1926.

No. 604.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, PETITIONER,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, RESPONDENT.

Brief for Respondent in Opposition to Grant of Certiorari.

It is not the purpose of this brief to present arguments, as such, upon the ultimate merits of this controversy. This brief is directed solely to the question whether the case presented by the petition and supporting brief is one in which this court should exercise its power to grant certiorari.

It is of first importance, therefore, to define what questions the petitioning corporation seeks to have determined by this court:

To illustrate: In the courts below it was contended that the ownership by the United States of the capital stock of the Fleet Corporation was relevant to the granting to it of the preferential rate to which only the Government is entitled. It was therefore with this question principally that the opinion of the court below is concerned. But this argument is not proposed to be brought before this court, and is disclaimed (petitioner's brief, p. 21).

The alleged errors which this court is asked to review are these (petitioner's brief, pp. 17 to 18):

(1) A failure to give weight to a practical construction of a contract as claimed to have been followed in a course of dealing for forty-nine years.

(2) A holding that messages "paid for from public funds" may be denied the priority and preferential rate appropriate to Government messages.

(3) A holding that the Fleet Corporation was not such an agent of the Shipping Board as to be the agent of a department of the Government within the meaning of R. S., Sec. 5266.

No one of these alleged errors appears to merit the grant of the writ within the principles declared in Rule 35, paragraph 5 (c), of this court; and for convenience we discuss the alleged errors in the order in which the petitioner states them.

The Argument Founded on Practical Construction.

This contention appears to be founded on the theory already adversely adjudicated by this court.

Since 1910 telegraphic rates have not been a matter of private contract, but a matter of law. Western Union Telegraph Company *vs.* Esteve Brothers and Company, 256 U. S., 566, 65 L. Ed., 1094.

The argument now advanced is that the petitioning corporation, engaged in commerce, is entitled to a rate preferential as compared with competing corporations, because a course of dealing has set up an implied contract to give that preferential rate. Even if the telegraph company had expressly so contracted, this court has already settled that—

> "The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons . . . . since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all" (Western Union *vs.* Esteve Bros., supra).

The Fleet Corporation brings forward certain correspondence between the telegraph company and the Postmaster General, in 1873, (wherein the subject-matter was telegraphing by United States attorneys and marshals whose offices used for their expenses fees collected by them) as evidence of the practical construction placed on the Post Roads Act (approved July 24, 1866, 14 St. L., 291) by the telegraph company. Petitioner bases its argument apparently on the supposition that it is possible for the telegraph company to vary the law fixing its rates by its agreements or letters or practices. Let us suppose that the Postal Telegraph and Cable Company had taken a different position in similar correspondence. Are we to conclude that the Solicitor General on behalf of the Fleet Corporation would argue that the legal rate for the Western Union Telegraph Company was one thing, and for the Postal Telegraph Company, another?

We do not believe that this court need say again to settle the law that telegraphic rates are no longer matters of private agreement.

The trial court found on this point:

> "3. That the rates applicable to the telegraphic service rendered to the defendant by the plaintiff for which claim is made herein, are established and fixed by law, and no agreement, custom or course of dealing exists having the effect of varying the rates applicable to the messages of the defendant corporation." (Record, p. 56.)

The court of Appeals did not mention this argument in its opinion.

On this point, we submit that this case was properly determined, not upon consideration of any agreement or course of dealing between the Fleet Corporation and the telegraph company, nor upon any venerable letters passing between it and the Postmaster General, but strictly upon the legal merit of the claim of the appellant corporation to a preferential rate.

The Argument that Messages Were Paid for by Public Funds.

This test or formula advocated by petitioner by which to determine whether the Government rate is applicable had its origin in the correspondence between this particular telegraph company and the Postmaster General above referred to (petitioner's brief, p. 14; Record, p. 19, paragraph 19). It furnished a convenient rule of thumb for the determination of cases within the scope of what were the Governmental and quasi-Governmental activities of the 1870's, when the letter and opinion were written. The statute itself, however, the Post Roads Act, (supra, printed on p. 9 of petitioner's brief) contains no such formula. The source of the money for the payment of the telegraphic tolls is not mentioned in the statute.

But even if we assume that this definition of what is a Government message can be substituted for the definition contained in the statute, this case remains correctly decided.

The basis of fact assumed by petitioner's brief is lacking. Petitioner's statement of fact, fortified by no reference to the record, is

> "The Emergency Fleet Corporation had not, during the period here involved, any corporate funds; i. e., any funds belonging to it as a corporation. Payment for the telegrams is to be made out of funds belonging to the United States and appropriated by Acts of Congress." (Petitioner's brief, p. 17.)

The basis for this assertion, as we understand, is the fact that the operations of the Fleet Corporation have not produced sufficient revenues to meet its expenses, and therefore its stockholder, the United States, has met its deficit by appropriations of public funds. The fact that it has been necessary annually to supplement the corporation's revenues in order to cover a deficit does not, however, convert all of the funds of the Fleet Corporation into public funds. Nor does it necessarily follow that such deficits will arise or such appropriations be made in the future.

The petitioner correctly quotes the usual form of such

appropriations. Thus the expenses of the Fleet Corporation for the fiscal year 1921 were paid first from:

> "(a) The amount on hand July 1, 1920; (b) the amount received during the fiscal year 1921 from the operation of ships;" (41 St. L., 874, petitioner's brief, p. 13).

What can be meant by these phrases? "On hand" and "received" mean in the treasury of the Fleet Corporation, and received by the Fleet Corporation. These appropriations contemplate the use to exhaustion of the Fleet Corporation's revenues before the use of deficiency appropriations made to it.

It is true that the transfer of title of Fleet Corporation property from it has been assumed in decisions, as in the Sloan Shipyards case (258 U. S., 549, 568), but this was an assumption, not a finding or decision, and this court held that the assumed fact was immaterial.

The respondent does not concede, nor do the agreed facts show, that the Fleet Corporation is without property. Let it be assumed that the United States had the power by statute to take property from a corporation in which it is the sole stockholder (upon a theory perhaps of resulting trust), but it could justly take only what it had paid for, and the contention that it paid for all the property of the Fleet Corporation will not bear analysis. It should be remembered that the United States got $50,000,000 of corporate stock for the $50,000,000 with which it originally financed the Fleet Corporation. Such a transaction is not a gift. The Government received and still holds the consideration for its payment, the stock. The money became the property of the Fleet Corporation as against all persons including its stockholder.

The agreed statement of facts bearing on this point is as follows:

> "16. . . . All messages were sent out by the Fleet Corporation and paid for with funds derived by it as set forth in paragraph 14 hereof in connection with its operations as herein set forth." (Rec., p. 18.)
>
> "14. All property acquired by, or the legal title to

which became vested in, the Fleet Corporation has been exclusively the following:

"The Fifty Million Dollars ($50,000,000) appropriated and paid for its capital stock as aforesaid, the sums of money subsequently appropriated by Congress as appears from the several Acts appropriating the same, and property acquired by the expenditure thereof, and the proceeds of the sale and the revenues derived from the use of the property so acquired." (Rec., p. 16.)

It would appear to be too plain for argument that the money that came from the United States Treasury to buy stock, and was so used (and the stock still held), can not be said to have come from the Government treasury to pay telegraph tolls. It came from the corporate treasury to pay the tolls. Nor can money derived from operations based upon that capital be said to come from the treasury, or to belong, in any sense material to this suit, to the United States.

Nor did the Merchant Marine Act of June 5, 1920, purport to take from the Fleet Corporation all its property, as has been assumed. It provided only in those respects here material (Sec. 4) that all property "acquired by the President through any agencies whatsoever" pursuant to his repealed war powers, should be transferred to the Shipping Board.

There is in the citation in petitioner's brief (p. 17) to Section 14 of the Merchant Marine Act, a failure to distinguish between the Shipping Board, which for all purposes of this case may be treated as an administrative unit in the Executive Department of the Government, on the one hand, and the Fleet Corporation, on the other hand.

It is true as pointed out in petitioner's brief (p. 17) that by special statutes (40 St. L. 651; 42 St. L. 444), the Comptroller General was directed to audit the financial transactions of the Fleet Corporation. The fact that these special statutes were necessary in addition to Section 236, R. S., as amended, wherein that officer had been given authority over claims by and against the Government,

is but an additional evidence that the petitioning corporation is not a part of the Government. Petitioner's point, however, that it "is obligated to account to the United States" (p. 17) is not disputed. Nor is the fact that the petitioner is probably greatly in debt to the United States disputed. These facts, however, seem consistent only with out understanding of the situation, which is that the United States has advanced money to cover its deficits.

We are unable, however, to find anything excepting the bald assertion to support the conclusion that the funds which the Fleet Corporation pays for the transmission of its telegraphic messages are funds of the United States.

The Agency Argument.

Reduced to its simplest terms, this argument of the petitioner is that the Fleet Corporation is the Government.

The Post Roads Act provides for "telegrams between the several Departments of the Government *and their officers and agents*" (italics are from the petitioner's brief, p. 9).

Of course, neither the Government nor any Department can send a telegram or do any other act excepting by an officer or agent. Nor can the Fleet Corporation.

When, therefore, an individual on the pay roll of the Fleet Corporation sends a telegram on its behalf, the ultimate problem is whether that individual is an agent of the Government.

Petitioner argues that such a person sending a telegram is an agent of the Fleet Corporation, which is an agent of the Shipping Board, which is an agent of the Government, and that therefore such a person is an agent of the Government. In this aspect of the case, the question now to be determined is whether this court wishes an opportunity to reconsider its decision adverse to this contention made in United States *vs.* Strang (254 U. S., 491).

The status of the Fleet Corporation prior to the passage of the Merchant Marine Act of June 5, 1920 (41 St. L., 988), will not be directly before the court if this case is further considered. That Act repealed the material provisions of

the Act of June 15, 1917 (40 St. L., 182), and the Act of March 1, 1918 (40 St. L., 438), pursuant to which the Fleet Corporation had functioned in the war emergency under temporary war authorizations. Had it not been for those war activities of the Fleet Corporation, it probably would not occur to anyone that there was room to argue that it was entitled to preferential rate in sending its telegrams any more than any other corporation engaged in the business of commerce at sea. The respondent did not decline to send the petitioning corporation's telegrams at the Government rate until May 23, 1922, after the Fleet Corporation had passed through the war emergency period ending June 5, 1920, and a reconstruction period ending September 30, 1921, and its activities had been placed on a peace-time commercial basis (Rec., p. 14, paragraph 11; as to prior activities, see Rec., p. 8, et seq., paragraph 10).

This court has decided in cases which concerned the war period, as well as the subsequent periods in the existence of the Fleet Corporation, that it is not the Government (see The Lake Monroe, 250 U. S., 246; Sloans Shipyard Corporation vs. U. S. S. B. E. Fleet Corporation and other cases, 258 U. S., 549; United States vs. Walter, 263 U. S., 15; and U. S. S. B. E. Fleet Corporation vs. Sullivan, 261 U. S., 146).

To present now to this court a case in which the court is asked to hold that the Fleet Corporation is such an agent of the United States that its telegrams are the telegrams of the United States, is to ask this court to reconsider such prior decisions; because so to hold will be to hold that its agents in sending the telegrams were the agents of the United States.

The respondent has not contended that the Shipping Board is not a department of the Government within the meaning of the Post Roads Act. It has not contended that telegrams between officers and agents of the Shipping Board responsible to it for their conduct are not telegrams between departments of the Government within the meaning

of that Act, and the agreed statement of facts shows that the Government rate and priority of transmission is accorded to the Shipping Board (Rec., pp. 18 to 19). If therefore the commercial activities now carried on by the Fleet Corporation through officers and agents responsible to it were carried on by the Shipping Board, a different question, and one that is argued in petitioner's brief, would be presented.

But the case sought to be brought before this court does not present the broad and novel question which is argued in the petitioner's brief. That question is whether the Post Roads Act applies to messages of the Government having to do with proprietary or commercial business carried on by the Government as contrasted with its function of government. That question would be one not yet decided by this court and of great interest to the respondent. In such a case it could be properly contended by the petitioner that the respondent was attempting to read into the Post Roads Act an exception (petitioner's brief, pp. 23 to 24). Such an implied exception would certainly be a logical one.

There is a real distinction between government and business, even though the government may engage in business. Government has to do with the regulation and control of the conduct of people and with service to them. It is necessarily exclusive. There can not be competing governments, competing controls or public services as to the same subject matter in reference to the same people.

But business is not necessarily exclusive. It may be competitive. It has to do with the persuasion of people voluntarily to trade.

The lines of demarcation may be broad, so broad as to admit of a twilight zone, but cases may fairly be decided to fall into the one class or the other.

The Post Office Department partakes somewhat of the nature of business, but it is under our system monopolistic, and is removed from the field of business. No competitor post-office is prejudiced by the extension of government rates to that Department.

Generally speaking, the preferential government rate

ought not be extended to any business in which others than the government may engage, nor was it intended to be.

If a bureau of the Shipping Board, or of the War Department, engaged in the shipping business in competition with persons in that business, it is clear that it *ought not* to have the government rate, but there would be admittedly difficulties in the way of a technical contention to that effect, in view of the phraseology of the statute and the failure to separate that bureau by any plain line of demarcation from other parts of the government establishment.

That question, however, is not the one involved in the present case.

In this case the government itself through its legislative and executive branches recognized the inappropriateness of having competitive business engaged in by a governmental bureau, and has split that activity off from itself, by creating a stock company and buying the stock. All technical difficulties, which might arise with regard to the application of the Post Roads Act to the telegraphing incident to this commercial activity, disappear as soon as it is judicially established that such a stock company is an entity separate from the government itself.

The agent of a department within the contemplation of the Post Roads Act was necessarily an individual carried on the payroll of the department and subject to supervision as to the details of his official conduct by the department head, or by an immediate superior responsible to the department head. The agents of the corporation set up by the government to carry on the commercial activity are, on the contrary, responsible to that corporation and not to the government, though the government may through stock ownership control them indirectly.

And it should be remembered that the petitioning corporation will not if its petition be granted ask this court to give any weight to the fact that the corporation's stock is owned by the government. Petitioner must necessarily take the position that the case would be the same if the

government was a minority stockholder or owned no stock at all.

The argument of the petitioner must go to the length of saying that a corporation having a "cost-plus" contract with the government may telegraph at the government rate because in a sense it is an agent of the government and because in a sense what it spends comes out of the public treasury.

Indeed, the argument of the petitioner seems to go further and be founded upon the fact that in cases in which war activities of the Fleet Corporation were under consideration, this court has referred to the Fleet Corporation as an "agency" of the government. It would be as logical for the respondent corporation to contend that its acts are the acts of the government because it also has been called "a government agent" by this court (Western Union Telegraph Company *vs.* Texas, 105 U. S., 460).

No decision of this court, however, of which we have knowledge has cast any doubt upon the fact that it is the settled law of this court that the Congress and the Executive Department effectively accomplished their purpose of setting up an entity separate from the government when they created the Fleet Corporation.

None of the argument put forward by the petitioner to the effect that the commercial business of the Fleet Corporation is a proper governmental activity is relevant if it be kept in mind that the "Executive Department" here involved, the Shipping Board, has deliberately avoided engaging in this activity itself and has created the Fleet Corporation for the very purpose of separating that activity from itself, and that the Congress has so created that corporation that it may be entirely separated from the government by a sale to private individuals of all of its stock.

Since this separation of the Fleet Corporation's business from the other activities of the Shipping Board is an accomplished fact, it is perhaps not material whether it be by legislative or executive action. The fact is, however, that the Fleet Corporation is not a mere creature of the Shipping

Board, having only such powers as are delegated by the Shipping Board. Its own independent charter must be remembered. (Rec., p. 26.) And the Merchant Marine Act provided (Section 12) that it should—

> "continue in existence and have authority to operate vessels, unless otherwise directed by law."

It was this same statute that in Section 4 made the sweeping grant of authority to the Shipping Board, and in Section 35 authorized it to act through the Fleet Corporation. The latter section continued the qualification—

> "except as herein otherwise specifically provided."

The authority of the Fleet Corporation to operate the merchant fleet can not therefore be said to be derived by any grant from the Shipping Board, no matter what were the terms of resolutions of the Shipping Board (Petitioner's brief, p. 16).

It appears to respondent, therefore, that the question which would be for determination by this court if certiorari were granted is whether those cases in which this court has held the Fleet Corporation to be a separate entity were properly decided; and this question does not appear to respondent to be one (to quote the rule of this court first above cited) "which has not been, but should be, settled by this court."

The Stipulation for Final Determination by this Court.

As noted in the petition (p. 2), this stipulation was made October 19, 1922, before the 1925 amendment to the Judicial Code, and at a time when the questions involved in this case were such as to make this the court of last resort. The stipulation is printed in the Record, pages 24-25.

Doubtless the Solicitor General means to imply what we should plainly state, that is, that the intention was that the case should be expedited to final determination by whatever court should be the court of last resort. The intervening change in the law might have set up a different

court as the court of final jurisdiction, and the stipulation would have applied equally and required both parties to endeavor to have the case as speedily decided by that court as was possible. The gist of the stipulation was the expedition to a final determination, not the identity of the court having power to make that determination. By the intervening change in the law, the Court of Appeals has become the court of last resort, and the decision of that court will be final unless this court grants certiorari, the petition for which, it may be remarked while we are discussing the stipulation, was filed not with any particular expedition, but one day before the expiration of the time fixed by law.

The respondent is, of course, directly interested in the collection from the petitioner of the large sum of money involved, an estimate of which is quite fairly made in the petition (p. 5). The grant of the writ, if it has no other effect, will delay this collection for a considerable period and prolong the uncertainty now existing in the relations between the two corporations involved.

Aside from these considerations, however, the respondent considers it to be its right if not its duty to point out, as is above attempted, what questions are involved in the specification of alleged errors to be brought before this court, in aid of a determination by this court whether it should grant the writ.

Respectfully submitted,

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September 11, 1926.

FILED
NOV 28 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 113.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, PETITIONER,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

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PRINTED BY THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

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vs.

THE WESTERN UNION TELEGRAPH COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

The Issues.

The question involved arises upon the claim of the United States Shipping Board Emergency Fleet Corporation to the benefit of the preferential telegraphic rate and service provided for the "several Departments of the Government and their officers and agents" by the Post Roads Act approved July 24, 1866 (14 Stats., 221, Rev. Stat., Section 5266), now U. S. C. Title 47, Sec. 3, as follows:

> "Telegrams between the several Departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster-General shall annually fix."

In the petitioner's brief the assumption is made that the Fleet Corporation sent and agreed to pay for these telegrams as the conventional agent of the United States

Shipping Board. In the opening paragraphs of its brief, in stating the question presented, the petitioner assumes that its contracts of employment of the telegraph company were made on its part as the delegate of the Shipping Board (Petitioner's brief, p. 2).

Also, it is stated in petitioner's brief, consistently with its assumption that the Fleet Corporation was but an agent, that the cost of these telegrams is "chargeable to the public treasury" (Petitioner's brief, p. 28). It is said that the moneys received by the Fleet Corporation from operations did not belong to the Fleet Corporation "in its corporate capacity" (Id., p. 29). Even the fact that $50,000,000 was received by the Fleet Corporation from the sale of its stock is, petitioner contends, immaterial on the question as to the creation of any corporate funds of the Fleet Corporation applicable to the payment of such debts as telegraphing (Id., pp. 29 to 30). The corporate entity of the Fleet Corporation, as a legal owner and disburser of funds, is as completely discarded in petitioner's argument as though it had not been created or capitalized.

Upon these two assumptions, both of which are stated as though they were agreed premises upon which the arguments of petitioner and respondent are to be based, is built the brief of petitioner, in the course of which the assumption of conventional agency and of Government payment of tolls is stated and reiterated as though beyond question.

The respondent contends that these two fundamental assumptions of the petitioner are unwarranted.

As respondent sees the case, the theory that the Fleet Corporation is but the delegate of the Shipping Board, not performing corporate acts (to use the petitioner's phrase), needs to be proven. So also must the theory that the Government's treasury, not the Fleet Corporation's, is the debtor. The question involved in this case can not be fairly or properly solved if a start is made by assuming these theories to be true.

The respondent's prima facie case is, of course, made

out by the admitted fact that it "transmitted and delivered" the messages "for and at the request of the Fleet Corporation," which "agreed to pay the plaintiff's legal and established charges therefor" (Declaration, Rec., p. 2; Plea, Rec., p. 46; Agreed Statement, Rec., p. 6).

The claim is reduced to the difference between the commercial and the Government rate by the admitted payment by the Fleet Corporation of the Government rate (Rec., p. 7), pursuant to the agreement which makes this case a test case for the determination of what rate is proper (Rec., p. 24).

The case then becomes one in which the burden of persuasion that the preferential Government rate is to be applied rests on the petitioner, and the case can be discussed most conveniently by first considering the petitioner's arguments. Though not all the facts which respondent considers material are summarized in the "statement" in petitioner's brief, the additional ones can be pointed out in the course of argument where their relevancy will better appear.

ARGUMENT.

I. Conformity by Fleet Corporation to Directions of Shipping Board Did Not Make Its Actions Delegated and Non-Corporate.

The petitioner is now apparently in agreement with the respondent in the view that the activities of the Fleet Corporation which are here involved are those subsequent to September 30, 1921. This date was used in the Agreed Statement of Facts as marking a convenient time from which to describe the peace-time activities of the Fleet Corporation, for the reason that the Shipping Board adopted a resolution dated that day providing for an allocation of activities between itself and the Fleet Corporation.

Respondent was at some pains in the courts below to point out that there are three well-marked periods in the activities of the Fleet Corporation: the war period, from July 11, 1917, to June 5, 1920 (Rec., p. 8, paragraph 10); the reconstruction period, from June 5, 1920, to September 30, 1921 (Rec., pp. 9 to 14); and the period when the messages involved in this suit were sent, that is, the period after the passage of the resolution of the Shipping Board of September 30, 1921, marking its return to a peace-time basis (Rec., p. 14, paragraph 11; Exhibit E 1, Rec., p. 30).

This seemed important for the reason that it was urged below by the petitioner that the conferring upon the Fleet Corporation of additional powers as an incident of the war so changed its original character that it was no longer a commercial corporation. Respondent urged below, and petitioner by its silence on the subject apparently concedes in this Court, that its activities since September 30, 1921, are those which control the character of the telegrams it now seeks to send at the Government rate, and are the only activities material in this suit.

The reasoning of the petitioner's brief is that, because the Fleet Corporation conformed in its activities during the period here in question to the directions given it by the Shipping Board, it was not acting in its corporate capacity. This fact of conformity to directions proves, the petitioner says, that its activities were delegated activities, performed as agent of the Shipping Board (Petitioner's brief, pp. 11 to 12, 17 to 18).

We respectfully submit that no such conclusion can be predicated upon the fact that the Fleet Corporation obeyed the direction of the owner of its entire capital stock. The very purpose of the creation of the Fleet Corporation must have been to have a corporation that would follow the directions of the Shipping Board. The statute pursuant to which the Shipping Board organized the Fleet Corporation directed it to subscribe for and always hold a majority of the stock, unless indeed it should sell it all (Shipping Act, 1916, approved September 7, 1916, 39 Stat., 728, Section

11). It was the original plan that all corporate acts of the Fleet Corporation should be under the control and subject to the direction of the United States, acting through the Shipping Board, so long as the United States held any stock therein.

The reasoning of the petitioner's brief would lead to the conclusion that the Fleet Corporation would act in its corporate capacity only when it disregarded the wishes of the Shipping Board, or when it engaged in some activity not authorized by that Board; in other words, that it could not act in its corporate capacity except when the corporate officers violated their official duties.

It was certainly the original plan that there should be a Government-controlled corporation, and that the Government's control should be exercised through Government ownership of stock. The Fleet Corporation can function only as a corporation, for that is what it is. When it functions in accordance with its stockholders' expressed desire, it is doing what most corporations do; certainly it is not the less functioning in its corporate capacity.

In attempting to maintain the position that when it conformed to the directions of the Shipping Board it was not acting as a corporate entity, it is said in petitioner's brief that the resolution of the Shipping Board of September 30, 1921, "contained no reference of any kind to any activities of the Fleet Corporation which it, as a corporate entity, was empowered to carry on as principal and not as mere agent of the Shipping Board" (Petitioner's brief, p. 11).

This statement appears to be inadvertent.

The certificate of incorporation of the Fleet Corporation states the object for which it was formed, as follows:

> "the purchase, construction, equipment, lease, charter, maintenance and operation of merchant vessels in the commerce of the United States and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conducting of said business as authorized by the laws of Congress,

> and to have and to exercise all the powers conferred by the laws of the District of Columbia upon corporations under Subchapter Four (4) of the incorporation laws of the District of Columbia" (Rec., p. 26).

The Merchant Marine Act of 1920, approved June 5, 1920 (41 Stat., 988), provided in Section 12:

> "And the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act, the provision in Section 11 of the 'Shipping Act, 1916,' to the contrary notwithstanding."

The resolution of the Shipping Board of September 30, 1921, to which petitioner refers and which petitioner states contains no reference to activities which the Fleet Corporation might exercise as a corporate entity, contains an enumeration of the activities to be carried on by the Fleet Corporation, the first of which is:

> "(1) The operation, maintenance, repair and reconditioning of vessels, provided that no established line shall be discontinued, or new line established, or allocation of passenger vessels made, without the approval of the United States Shipping Board" (Rec., p. 31).

It is difficult to understand how petitioner came to state that no activities referred to in this resolution were activities which the Fleet Corporation might carry on in its corporate capacity.

All the activities described in this resolution are described in general terms. They are all lines of activity which are within a reasonable construction of the Fleet Corporation's charter. This, we say, happens to be the fact. If, however, it were otherwise, and the Shipping Board had directed the Fleet Corporation during this period to perform *ultra vires* acts, it would make no difference.

The Fleet Corporation in engaging in such activities would still be acting in the only capacity in which it could act, that is, as a corporate entity, and the over-stepping of its *vires*, if of interest to any one, would interest the Department of Justice alone.

Yet the petitioner, as we understand its brief, appears to base its case upon the fact that the activities of the Fleet Corporation being carried on at the time these messages were sent were of the kind and in conformity with the directions described and contained in the Shipping Board's resolution of September 30, 1921, and therefore, petitioner says, not "on its corporate account" (Petitioner's brief, p. 17).

On the contrary, it seems necessary only to quote a description of those activities as contained in the Agreed Statement of Facts to compel the conclusion that they were the very activities for and in which this separate entity was expressly created, capitalized and authorized by law to engage. The Agreed Statement on this point is as follows:

> "11. During the period when the messages involved in this suit were sent and at all times subsequent thereto the Fleet Corporation operations have been exclusively the following: The management, operation, maintenance, repair and reconditioning of vessels; the establishment and operation of lines and routes of vessels; the completion or conclusion of construction work upon vessels; the sale of vessels; the operation and sale of housing projects, real estate, railroad and other similar property; the operation and sale of dry docks; the custody and sale of other property and materials; matters of accounting; insurance and matters pertaining to the same; the operation of pier and pier facilities; the disbursement and expenditure of all moneys arising out of operations, and of funds allotted to it from appropriations by Congress; the leasing and rental of offices, warehouses, docks and storage facilities deemed essential by it for its business and

for its terminal facilities; matters incidental to the foregoing, including the employment, compensation and removal of officers and employees" (Rec., p. 14).

II. The Relation of the United States to the Fleet Corporation Is Simply That of Controlling Stockholder.

There is no doubt that the Fleet Corporation is in a broad sense an operating agency or instrumentality of the Government. In the same broad sense, every corporation is an operating agency or instrumentality of its stockholders. Legally no relation of agency exists.

Even if the petitioner could establish (contrary to the fact, as respondent sees it), that the Fleet Corporation is a conventional agent of the United States or of the Shipping Board, so that it might be fairly said that the relation between the United States and the Fleet Corporation is that of principal and agent, it would not follow that the Fleet Corporation is such an agent as comes within the description of "their officers and agents" used in the Post Roads Act. Nevertheless, in order fully to present the issue involved in this case, it seems desirable to state the respondent's view as to the relationship between the United States and the Fleet Corporation at the times when these messages were sent.

When a corporation or person follows the directions of the Government or another in business matters and is furnished with funds by that other, it is often the fact that the directing Government or person is a principal and the acts of the directed party are those of an agent for the principal. The term agent or agency or instrumentality may be sufficiently accurate to describe the relationship between such parties for many purposes, but when as in the present case a legal conclusion is sought to be drawn from the alleged agency, it is not sufficient to define the relationship between the parties by any loose or general use of that term.

It is not accurate to say that the United States was

the principal and the Fleet Corporation was the agent in the transactions with which we are here concerned.

If this were true, the United States would be the obligated party upon contracts made by the Fleet Corporation, including the contracts for the sending of these messages.

Certainly this is not the view even of the petitioner, or else the petitioner would not have made the agreement of October 19, 1922, with the respondent wherein it was agreed that upon the final determination of this suit "the Fleet Corporation and the Telegraph Company will settle their accounts in accordance with the final determination of the suit aforesaid" (Rec., pp. 24 to 25).

The whole hypothesis of the present suit, both on the part of the respondent and the petitioner, is that the petitioner employed the respondent to transmit messages and that the only question involved is the determination of the appropriate rate, not whether the Fleet Corporation or the United States Government is the proper party defendant.

If the petitioner had been of the view that the United States is the party liable on the contract to pay for these messages, as would be the case if the corporation were an agent merely, then its main defense would undoubtedly have been that it is not liable at all either for the Government rate or the commercial, since when the principal is disclosed the liability on a contract is the principal's and not the agent's.

The object most usually sought to be attained by the formation of a corporation is the avoidance of personal responsibility, as principals, by the persons who form the corporation and control it. One of the principal benefits realized from the transaction of business through corporate forms is this very escape from the relation of agency between the ultimate owners of the business and the individuals who carry it on.

The history of the Fleet Corporation makes it plain that this usual and indeed inseparable incident of incorporation was expressly sought by the Government.

The Shipping Act of 1916 (39 Stat., 728) authorized the Shipping Board to form one or more corporations for

the purchase, etc., and operation of merchant vessels in the commerce of the United States.

The corporation was formed under Chapter XVIII, Subchapter Four of the Code of Law for the District of Columbia (31 Stat., 1189 et seq.). The certificate of incorporation complies with Section 606 of this statute, and its statement of purposes, as above quoted, appears to make the corporation for all time, or until the certificate shall be amended, a private corporation engaged in mercantile business.

Such a corporation has, under Section 607, the capacity of suing and being sued, that of having a common seal and altering the same at pleasure, and the capacity to purchase, hold or convey any real or personal estate necessary to carry on the operations named in its certificate.

Section 608 provides that such a corporation shall be managed by trustees who shall be stockholders and a majority citizens of the District of Columbia. The Board of Trustees of the Fleet Corporation as constituted by the certificate complied with these requirements, and it appears that the Fleet Corporation continues to be managed by its corporate trustees, whose subordination to the will of the United States as stockholder is admitted to be carefully preserved in the current resolutions of the Shipping Board (Rec., pp. 32, 34).

It is provided by Section 613 of the Code that no corporation under that subchapter could transact business until 10 per cent of the stock shall have been actually paid in.

By an amendment to the Code, Section 552, (the Act of February 4, 1905, 33 Stat., 689), it is provided that the Recorder of Deeds shall not record any certificate of incorporation until it has been proven to his satisfaction that all the capital stock has been subscribed for and not less than 10 per cent has been paid in cash, and that the money derived therefrom is then in the possession of the first board of trustees.

Complying with this statute, a stock subscription list showing that the Shipping Board, on behalf of the United

States, had subscribed for 499,993 shares and that seven individuals had subscribed for one share each was exhibited to the Recorder of Deeds at the time the original certificate was filed. There was also exhibited a certificate of the Secretary of the Treasury to the effect that there was $50,000,000 in the Treasury to the credit of the trustees of the corporation. (Rec., p. 15, paragraph 13.)

Section 614 of the Code provides that the stock shall be transferable, thus authorizing the sale of the stock of the United States contemplated by the Shipping Act of 1916, which had provided:

> "The Board, with the approval of the President, may sell any or all of the stock of the United States in such corporation, but at no time shall it be a minority stockholder therein."

Section 615 of the Code provides that all the stockholders shall be liable to the creditors of the company for the unpaid amount due on the shares of stock held by them until the whole amount of the capital stock shall be paid in and a certificate thereof made and recorded. Section 616 of the Code provides how such a certificate shall be framed and executed, the purpose of which is to make record evidence of the termination of the liability of stockholders, in this case the termination of the liability of the United States or its successors in interest as stockholders.

The Fleet Corporation considered it essential, and properly so, to avail itself of this provision of the statute, and on May 1, 1918, filed its certificate as to the full payment of stock in the office of the Recorder of Deeds (Rec., p. 15, paragraph 13; Rec., p. 37, Exhibit "H").

It is significant that this certificate, the purpose of which was to mark the termination of the liability of the United States for undertakings of the Fleet Corporation, was made and filed after the events beginning with the issue of the President's Executive Order bearing date July 11, 1917 (Rec., p. 8, paragraph 10; p. 14, paragraph 12), which are referred to when it is said that the Fleet Corporation was used as a war instrumentality by the President.

The corporate organization so set up has been carefully preserved throughout the life of the Fleet Corporation to the present day. Stock certificates were issued and the successors of the original trustees have been in each case qualified as stockholders in accordance with Section 608 of the Code (Rec., p. 15, paragraph 13).

It had been provided by Section 11 of the Shipping Act of 1916 that:

> "Five years from the conclusion of the present European war the operation of vessels on the part of any such corporation in which the United States is then a stockholder shall cease and the said corporation stand dissolved."

By the Merchant Marine Act of 1920, it was provided (Section 12, quoted *supra*, p. 6), that the Fleet Corporation should continue in existence and have authority to operate vessels.

No permanent statute has been passed changing the original character of the Fleet Corporation as a private corporation organized under the provision of law authorizing the incorporation of private corporations in the District of Columbia, nor changing its original character in any respect, unless the statute last quoted effects a narrowing of its corporate powers to the operation of vessels; and there is now an unquestionable concurrence of judicial decisions to the effect that it is such a private commercial corporation subject to all the usual responsibilities and liabilities of such a corporation.

It is a fact that the corporation so existing is subject to the direction of the United States, exercised under existing statutes through the Shipping Board. This subjection or subordination is, however, to be accounted for solely by the fact that the United States owns all of the corporate stock. The control of the United States is not that of a master over its servant, or a principal over its agent, nor of a State over its officer, but that of a stockholder over a corporation of which it has, by reason of its stock ownership, complete

control. No other legal relation exists to which to refer the availability of the Fleet Corporation for such use as the United States may see fit to make of it. The procedure of continuous control of the corporation is strikingly similar to that in the case of the Panama Railroad Company (see Panama Railroad Co. vs. Curran, infra, pp. 26).

The fact that such control is exercised to direct the Fleet Corporation to operate ships which may be owned by the United States, or to deal with dockyards and other properties of the United States, does not change the legal relation between the United States and its corporation.

The fact that it does not own all or some of the ships and dockyards which it uses does not derogate from the fact that in operating them the Fleet Corporation functions as a corporation, operates on its corporate account.

In this connection the petitioner's brief says:

> "Respondent's argument must go to the length of contending that a corporation can never act as an agent of the United States" (Brief, p. 19).

The respondent does not contend that the United States may not make contracts by means of the Fleet Corporation as an agent. Respondent contends that the Fleet Corporation is not such an "agent" as was contemplated by the Post Roads Act; but the respondent's point here is that the contracts to pay for these telegrams were not made by the United States through the Fleet Corporation, but by the Fleet Corporation; and the fact that the Fleet Corporation was, during the period in question, engaged in activities in which it had been directed by its stockholder to engage does not convert the contracts which it may make into contracts of its stockholder.

On this point the petitioner cites U. S. S. B. E. Fleet Corporation vs. Galveston Dry Dock Co. (13 Fed., [2d] 607). In that case, however, the contract by the Fleet Corporation contained the following provision:

> "Work to be . . . charged to the account of the United States Shipping Board, to be audited

> and checked by representatives of the comptrollers; statement covering the cost to be rendered to the Division of Construction and Repair at New Orleans, Louisiana."

Judge WALKER, writing the opinion, said:

> "Plaintiff's acceptance of orders containing that provision evidences its agreement to look to the Shipping Board for payment for the labor and material called for by those orders, and is inconsistent with the contracts sued on having the effect of obligating the Fleet Corporation to pay the amounts promised to be paid."

To demonstrate that this decision does not help the petitioner, one need only refer to a case decided a few months theretofore by the same Circuit Court of Appeals for the Fifth Circuit, U. S. S. B. E. Fleet Corporation *vs.* Texas Star Flour Mills (12 Fed. [2d], 9, 11), a suit to recover damage to flour shipped under contract with the Fleet Corporation, in which also Judge WALKER wrote the opinion and in which he said:

> "There is no merit in the contention that the liability asserted could not be enforced against the carrier because in the transaction in question it acted as agent of the United States. The record does not show that it acted as such agent in those transactions. Liability incurred by it as a carrier is subject to be enforced by suit against it. Sloan Shipyards *vs.* U. S. Fleet Corp., 42 S. Ct., 386, 258 U. S. 549, 66 L. Ed., 762."

So in the present case the petitioner seeks to show that the Fleet Corporation is but an agent, pointing out the fact of conformity with the directions of the Shipping Board, its stockholder, as though that fact marked the contracts with the telegraph company as having been made as agent for the Shipping Board. What the petitioner points out, does not, we submit, support a conclusion that the Shipping Board was the principal in the contracts made for the sending

of messages by the telegraph company for the Fleet Corporation.

Yet the petitioner concedes that the fact that the Emergency Fleet Corporation is in a broad sense an operating agency or instrumentality of the Government which owns all of its capital stock does not entitle it to the Government rate for its messages. And the petitioner further concedes that if the activities of the Fleet Corporation here involved were "on its corporate account," in which the United States is interested only as stockholder, the respondent should prevail in this litigation (Petitioner's brief, p. 17).

III. The Tolls Upon These Messages Are Not Charges Upon the Public Treasury But Upon the Fleet Corporation's Treasury.

In this connection, the petitioner relies upon the fact that Congress has made appropriations for the expenses of the Fleet Corporation, "thus recognizing," the petitioner says, "the responsibility of the United States, as principal, for the expenses of its agent" (Petitioner's brief, p. 29).

The financial operations of the Fleet Corporation have been recently under examination by this court, U. S. ex rel. Skinner and Eddy Corporation vs. McCarl (72 L. Ed. Advance Opinions, 13), decided October 10, 1927.

In that case it was held that the Comptroller General had no jurisdiction of a claim arising under a contract made with the Fleet Corporation "representing the United States," though the Comptroller General had jurisdiction under the Act of June 10, 1921, 42 Stats., 20, 23, 24, of all claims by or against the Government and all accounts in which the United States is concerned as a debtor or creditor. The Government contended that the claims arose as an incident to the war powers conferred on the President by certain statutes referred to in Section 2 (c) of the Merchant Marine Act of 1920, jurisdiction to settle controversies under which had been conferred on the Shipping Board. This Court held that even if the claims did not arise as an incident to contracts under powers delegated by the President, but as

incidents to the original corporate powers of the Fleet Corporation, yet the general practice of keeping such corporate financing and financial control separate from the general financing of the Government was in accordance with law:

> "For the Fleet Corporation is an entity distinct from the United States and from any of its departments or boards; and the audit and control of its financial transactions is, under the general rules of law and the administrative practice, committed to its own corporate officers except so far as control may be exerted by the Shipping Board."

As to the funds out of which the telegraph company is to be paid, the following excerpts from the Agreed Statement of Facts seem material:

> "All messages were sent out by the Fleet Corporation and paid for with funds derived by it as set forth in paragraph 14 hereof in connection with its operations as herein set forth." (Rec., p. 18.)

The funds so referred to are thus described in paragraph 14:

> "The Fifty Million Dollars ($50,000,000) appropriated and paid for its capital stock as aforesaid, the sums of money subsequently appropriated by Congress as appears from the several Acts appropriating the same, and property acquired by the expenditure thereof, and the proceeds of the sale and the revenues derived from the use of the property so acquired." (Rec., p. 16.)

Among the activities of the Fleet Corporation during the period here in question were the operation of vessels and various kindred matters and—

> "the disbursement and expenditure of all moneys arising out of operations, and all funds allotted to it from appropriations by Congress" (R. p. 14).

It is therefore plain that the Fleet Corporation has a corporate treasury which is to be distinguished from the United

States Treasury, and that disbursements for telegraphing are made from the Fleet Corporation's treasury and operate to reduce its net revenue.

Petitioner relies on the provision in Section 14 of the Merchant Marine Act of 1920, to the effect that the "net proceeds" derived by the Shipping Board, after July 1, 1921, after certain deductions, shall be covered into the Treasury (Brief, pp. 12, 28). Not only does this provision relate by its terms to the Shipping Board, and only inferentially to the Fleet Corporation, but the significance of the word "net" will not escape the court. Deductions from the gross are contemplated. If the "net proceeds" be from operation of ships by the Fleet Corporation, the *gross* proceeds obviously must go into its corporate treasury, and then suffer diminution by the amount of such operating costs as telegraphing, before the *net* is ascertained.

If there were net proceeds from operation, they would be profit, and could ultimately go nowhere else than to the sole stockholder, if the owner of the corporation thought it wise to withdraw them from the corporate treasury. When all the stock is in a single owner it is immaterial whether he takes his profits in dividends or directly from the company's treasury, since there is no one else to object.

It can not be contended that any different legal principle is applicable by reason of the fact that the Fleet Corporation may be temporarily operating at an annual loss instead of at an annual profit. The fact that it is operating at a loss makes it desirable for its sole stockholder, the United States, to appropriate to cover that loss, otherwise the operation can not go on. If it were operating at a profit, there would be an annual surplus, distributable to its stockholder. In either event, the cost of telegraphing operates to decrease its profit or possibility of profit.

The argument of the petitioner, as we understand it, is that inasmuch as the profit would go to the United States and the loss is met by the United States, the cost of telegraphing is an indirect charge on the public treasury. Petitioner, however, considers the fact that the United States

has met the deficiencies in the treasury of the Fleet Corporation as demonstrating that the United States is a principal and the Fleet Corporation an agent, and as demonstrating that the Fleet Corporation has no funds "in its corporate capacity." The respondent, on the contrary, finds in the fact that the United States is the sole stockholder of the Fleet Corporation and that it is not ready to dispense with the Corporation's activities a complete explanation of the contributions by the United States toward these deficiencies.

It will be convenient to deal separately with the contention that even an indirect charge upon the public treasury justifies the Government rate, and that will be done hereinafter (*infra*, p. 20). This portion of the brief is concerned with the proposition that it is the Fleet Corporation's own treasury which is the debtor in respect of these messages.

Statements have been made in the course of opinions in cases concerning the Fleet Corporation to the effect that it has no property. Thus in the Sloan Shipyards case (258 U. S., 549, 568), Justice HOLMES said:

> "The transfer of the property of the Fleet Corporation to the Shipping Board by the Act of June 5, 1920, chap. 250, Section 4, 41 Stat. at L., 988, 990, may affect the value of the remedy afforded by the present suit, but not the jurisdiction of the court."

Chief Justice TAFT, dissenting in the same case, said (p. 573):

> "Congress has taken over all the assets of the Fleet Corporation, so that such judgments will be valueless except as Congress shall conclude to pay them."

In the recent Skinner and Eddy case, supra, Justice BRANDEIS said:

> "In 1923, the Fleet Corporation assigned to the United States all of its assets, including accounts against divers persons for the payment of money."

The Merchant Marine Act of 1920, did not, however, purport to take from the Fleet Corporation all its property,

as has been assumed. It provided only (Section 4) that all property "acquired by the President through any agencies whatsoever" pursuant to his repealed war powers, should be transferred to the Shipping Board.

Whatever had been bought with the $50,000,000 capital of the Fleet Corporation, or bought with the proceeds of the sale of the first purchase, was certainly, as between the Fleet Corporation and its subscribing stockholder, the United States, the corporate property of the Fleet Corporation. Such property had not been "acquired by the President."

The annual appropriation acts subsequent to the enactment of the Merchant Marine Act purport to deal with the money in the treasury of the Fleet Corporation, but invariably the money in the treasury and the proceeds of operation of ships are either appropriated to the Fleet Corporation's purposes or recognized as belonging to it. Thus in the Sundry Civil Act, approved June 5, 1920 (C., 235, 41 Stats., 874, 891, Petitioner's brief, p. 41), it is provided that the expenses of the Fleet Corporation—

> "shall be paid from the following sources: (a) the amount on hand July 1, 1920; (b) the amount received during the fiscal year 1921 from the operation of ships;"

The Sundry Civil Act approved March 4, 1921 (C. 161, 41 Stats., 1367, 1382), was in the same form.

The Sundry Civil Act approved June 12, 1922 (C. 218, 42 Stats., 635, 647), used the same phrases, but was in form an appropriation of these amounts.

Whether, however, the expressions in these appropriation acts are those of appropriation, as though the money were in the United States Treasury, or words indicating a recognition that such moneys are already in the treasury of the Fleet Corporation, the uniform effect of these acts was not to disturb the Fleet Corporation's possession of such amounts as it had on hand, and not to disturb its possession of the proceeds of the operation of ships, and no conclusion

of expropriation of the Fleet Corporation's funds may therefore properly be drawn from them.

The Merchant Marine Act and these appropriation acts contain the only references known to us from which an inference is sought to be drawn that the Government has taken over the property of the Fleet Corporation. When the present record was made up, it was considered material by the Fleet Corporation to put in it all the facts bearing upon this contention. It is noteworthy that the statement of fact most nearly supporting the view that the Fleet Corporation is without funds or property, in the present record, is that—

> "The Fleet Corporation has always considered that its holdings of such property and its functioning were always on behalf of the United States, and that no private purpose was to be served by it thereby." (Rec., p. 16.)

This statement amounts to no more than an appropriate declaration by the corporation that it was created to serve its stockholders, since there has been no change as yet in the stock ownership.

We are unable, therefore, to assent to the proposition that the Fleet Corporation is without property; but even if it were that would not affect its liability on its contracts.

IV. The Alleged Rule of Practice to the Effect that Tolls Depleting the Public Treasury Should Be Calculated at Government Rate Is Not Applicable to Fleet Corporation Messages.

As stated before, we regard it as conceded in the present case that the remedy of the telegraph company is not against the Government but against the Fleet Corporation. We are not confronted here with a contract of hiring of the telegraph company wherein the Fleet Corporation has undertaken to pledge the credit of the Shipping Board or of the United States. It is agreed that it is the Fleet Corporation which owes the tolls at whatever rate is legally applicable.

We have pointed out that the legal relationship between the Fleet Corporation and the Government is that of corporation and stockholder.

The conclusion seems inevitable that unless the Government chooses to make good the losses of the Fleet Corporation because of its interest in assuring its continued operation, the Government has no legal relation to these telegraphic tolls by means of which it can be compelled to pay them.

Yet the petitioner claims that by reason of a practical construction placed upon the Post Roads Act by the United States and the respondent for many years, it is immaterial whether the tolls are a direct charge on the public treasury or an indirect charge. If the United States is ultimately poorer by the amount of the tolls petitioner says, the preferential Government rate must be given. This argument is built upon correspondence between the Postmaster General and a former president of the Western Union Telegraph Company had in 1873, and in an opinion of the Attorney General rendered under date of July 10, 1873 (14 Op. A. G., 278) (Petitioner's brief, pp. 25 to 29).

The subject-matter of that correspondence and the opinion of the Attorney General was certain telegraphing done by United States marshals and United States attorneys who paid for the telegrams out of official fees and accounted to the Government for the net balance.

There is such a difference between the relationship between the Government and a corporation with which its legal connection is that of stock ownership on the one hand, and the relationship between the Government and a United States marshal or a United States attorney on the other hand, as to make the considerations applicable to the one case wholly inapplicable to the other. There is no doubt that a United States marshal or a United States attorney is an officer or agent of the Department of Justice, a person on the civil payroll, whether paid on the fee system or by a monthly salary. It can not be supposed for a moment that the parties to that correspondence and that ruling

attempted to lay down a rule of decision which would be appropriate to dispose of the present issues.

As a matter of fact, while the respondent has no record of the correspondence in question and at this time knows nothing of the circumstances except what appears from the printed opinion of the Attorney General, it seems evident from the letter of the former president of the telegraph company to the Attorney General that it was his understanding, however mistaken, that the "official fees or commissions" to which he referred were the property of the individual district attorney or marshal and not of the Government; and that all he was trying to do at that time was to safeguard the company against having to accept the Government rate for messages by which the treasury was not affected either directly or indirectly, but which were paid for (as he supposed) by Government agents out of their official compensation for services. However this may be, the principle was plainly recognized by both parties to this ancient correspondence that the Government rate did not apply except where the message was to be paid for "out of the treasury," as stated by the company's president, or "out of public moneys" as stated by the Attorney General—in either event money the title to which was in the United States, and which was "to be accounted for to the Government by the officer making the expenditures" (petitioner's brief, page 27). The title to the funds of the Fleet Corporation is not in the United States, nor are its expenditures subject to review by the Government accounting office.

If it were true that the ultimate effect on the Federal Treasury is the universal test as to whether messages are to be accorded the Government rate, then every corporation in which the Government owns stock would be entitled to the benefit of the Government rate in telegraphing. In the case of all such corporations, the Government would get a greater profit or suffer less loss if the telegrams of the corporation could be sent at lower rates.

The petitioner's line of reasoning would compel the Government rate to be extended to the Philippine National

Bank, the Panama Railroad Company, the Inland Waterway Corporation, the Federal Intermediate Credit Banks, the War Finance Corporation, the United States Housing Corporation, the United States Spruce Corporation, the United States Grain Corporation, the Federal Land Banks, and others.

It is noteworthy that in the enumeration of the various Bureaus and bodies, other than formal Departments of the Government, which the telegraph company has allowed to telegraph at the Government rate, contained in the Agreed Statement of Facts (Rec., p. 19), and repeated in petitioner's brief (p. 7), these corporations are conspicuously absent, with the single exception of the War Finance Corporation.

Yet the petitioner boldly states in its brief that the rule or test laid down in the correspondence of 1873 constitutes a practical construction of "over fifty years" standing which must be rejected in order not to be applied to the present case (Petitioner's brief, pp. 25, 28).

As to the Philippine National Bank, there has been an express adjudication that it is not entitled to the Government rate because not such an agent of the Government as is contemplated by the Post Roads Act. The case involving this bank is the only prior case in the courts involving the construction of this part of the Post Roads Act. It is Commercial Pacific Cable Co. *vs.* Philippine National Bank (263 Fed., 218) decided January 26, 1920, Southern District of New York. Judge MAYER stated the contention of the Philippine National Bank as follows:

> "That is is a department of the government of the United States, and that its officers and agents are officers and agents of the government of the United States, within the meaning of the Post Road Act of Congress of July 24, 1866 (Comp. St. Secs. 10072-10077), and that telegrams sent by defendant and its officers and agents are messages of the government of the United States or the officers and agents thereof within the meaning of said act, and hence that defendant was and is entitled to send the same through

the Bureau of Insular Affairs of the United States government as an intermediary at the government half rates and with precedence as to transmission."

In disposing of this issue he said, in part:

"The act creating the defendant bank provided that the government of the Philippine Islands should subscribe at the outset for 101,000 shares out of a total authorized issue of 200,000, and that as part payment for these shares it should transfer to the bank all the assets of the Government Agricultural Bank, which was owned absolutely by the government of the Philippine Islands; the government of the Philippine Islands is required at all times to own at least 51 per cent of the stock of the bank; and at the present time it owns approximately 85 per cent of the outstanding stock. The voting power of this stock is vested exclusively in a committee, consisting of the Governor General, an official appointed by the President of the United States, the President of the Philippine Senate, and the Speaker of the Philippine House.

"The affairs and business of the bank are managed by a board of directors consisting of the president, the vice-president, and five elective members. The president and the vice-president are appointed by the Governor General, with the advice and consent of the Philippine Senate, and the remaining five directors are elected in accordance with the General Corporation Law. The approval of the Governor General and the presiding officers of the two houses of the Philippine Legislature is necessary for various corporate acts on the part of the bank.

"The Attorney General of the Philippine Islands is the attorney for the bank, and the insular auditor, a person appointed by the President of the United States, is ex-officio auditor of the bank. Power is given to the Governor General, with the advice and consent of the Philippine Senate, to remove various officers of the bank. In respect of the bank as a governmental agency, designed to build up the wealth of the Islands, the following clauses are found in the charter:

"Fifty per cent of its capital and surplus may

be loaned on notes secured by mortgages on real estate. This, it is true, is an unusual provision; the national banks in the United States being prohibited from making loans secured by mortgages on real estate.

"It is given the exclusive use of the word 'National' with respect to banking business. . . .

"When authorized by the Governor General and the presiding officers of the two houses of the Philippine Legislature, it is authorized to guarantee both as to principal and interest, or either, bonds issued by incorporated companies for the erection of and additions to industrial plants or manufacturies principally used for the manufacture and preparation of the products of the Philippine Islands, and subject to the same approval the bank is authorized to purchase bonds issued by any duly incorporated company engaged in the manufature or preparation of products of the Philippine Islands.

"In view of the foregoing and other provisions, it is argued that the interest of the United States is so inextricably mingled with the purposes and administration of the bank and the welfare of the Islands and their government that the bank in effect is a department or agent of the government of the United States. But, although in the complex problems attendant upon the administration of the Philippine government, in the interest of its welfare and that of the United States, the bank has, of course, many close relations with the United States government, nevertheless there may be private ownership to the extent of 49 per cent of the stock of the bank, and it is permitted to do and does do a commercial business for profit, like any other bank. A financial institution so constituted can not be a 'department' of the United States government, or an 'agent,' in the sense of section 5266 of the Post Road Act, supra."

In disposing of the case Judge MAYER quoted from and relied upon the case of Bank of the United States *vs.* Planters' Bank of Georgia (9 Wheat., 904) as does, in fact, almost every opinion bearing upon this question. In passing, we note that when the Sloan Shipyards case was before the District Court (268 Fed., 624, 627) the District Judge based

his opinion (which was reversed by this Court, 258 U. S., 549) in part upon the proposition that the case of Bank of the United States *vs.* Planters' Bank was to be distinguished from a case involving the Emergency Fleet Corporation.

The status of the Panama Railroad Company has been adjudicated in Panama Railroad Co. *vs.* Curran (256 Fed., 768, decided March 24, 1919) by the Circuit Court of Appeals, Fifth Circuit, an action for damages against the Panama Railroad Company. The Court said:

> "The defendant is a New York corporation. All its capital stock is owned by the United States. Thirteen of the shares stand in the names of the directors of the company. Each of the directors for the time being gives to the Secretary of War an irrevocable power of attorney to transfer the stock standing in his name at any time. This enables that official, when the holder of a share ceases to be a director, to transfer it to the succeeding director. In the manner indicated the government absolutely controls the operations of the company. An intention to preserve the existence of the defendant as a private corporation has been clearly manifested in acts of Congress, some only of which need be mentioned. Act, June 25, 1910, c. 384, making appropriation for sundry civil expenses of the government for the fiscal year ending June 30, 1911 (36 Stat., 771), contains an item of $2,000,000 'for the payment of the cost of relocating the Panama Railroad, including salaries, wages, material, and supplies, and all other expenses incident thereto.' That act contained the following provision:
>
> " 'The foregoing appropriations shall be available to reimburse the Panama Railroad Company for marine losses, and for losses due to destruction of or damage to its plant, equipment, or commissary supplies by fire: Provided, that the Panama Railroad Company shall carry no insurance against loss from causes covered by this appropriation: Provided, further, that hereafter payment by the Panama Railroad Company to the United States, in accordance with the treaty with Panama, of the annual subsidy of two hundred and fifty thousand dollars, as pro-

vided by the concession granted by the United States of Columbia, shall not be required.'

"Section 6 of the Panama Canal Act of August 24, 1912 (37 Stat., 560 [Comp. St. Sec., 10042]), contains the following:

" 'The President is also authorized to establish, maintain, and operate, through the Panama Railroad Company or otherwise, dry docks, repair shops, yards, docks, wharves, warehouses, storehouses, and other necessary facilities and appurtenances for the purpose of providing coal and other materials, labor, repairs, and supplies for vessels of the Government of the United States and, incidentally, for supplying such at reasonable prices to passing vessels, in accordance with appropriations hereby authorized to be made from time to time by Congress as a part of the maintenance and operation of the said canal. Moneys received from the conduct of said business may be expended and reinvested for such purposes without being covered into the Treasury of the United States; and such moneys are hereby appropriated for such purposes, but all deposits of such funds shall be subject to the provisions of existing law relating to the deposit of other public funds of the United States, and any net profits accruing from such business shall annually be covered into the treasury of the United States. Monthly reports of such receipts and expenditures shall be made to the President by the persons in charge, and annual reports shall be made to the Congress.'

"Departmental regulations and rulings indicate that it has been recognized that a purpose of preserving the corporate existence and organization was to make inapplicable to Panama Railroad receipts provisions requiring payment into the treasury of receipts by governmental agents. Whatever the purpose was, such legislation as that which has been mentioned shows that the lawmakers intended the relation between the government and the defendant to be that of a stockholder to the corporation which issued the stock, and not that of principal and agent. This being true, the following statements made in the opinion of Chief Justice Marshall in the case of Bank of the United States *vs.* Planters' Bank, 9 Wheat.,

904, 6 L. Ed., 244, are applicable to the facts of the instant case . . .

"From the fact that one owns all the stock of a private corporation it does not follow that the acts of the corporation are to be treated, not as its acts, but as the acts of its sole stockholder. Pullman Palace Car Co. *vs.* Missouri Pacific R. Co., 115 U. S., 587, 6 Sup. Ct., 194, 29 L. Ed., 499; Conley *vs.* Mathieson Alkali Works, 190 U. S., 406, 23 Sup. Ct., 728, 47 L. Ed., 1113; Salas *vs.* United States, 234 Fed., 842, 148 C. C. A., 440. The defendant was not, on the ground mentioned, exempt from the liability asserted against it."

If the petitioner's proposed test, that of direct or indirect charge upon the public treasury, were to be accepted, there would appear to be no limit to the list of corporations claiming the benefit of the preferential Government rate. Cost-plus contractors with the Government would then appear to be clearly entitled to it. Such corporations as the "Realty Companies, the capital stock of which is owned by the Fleet Corporation," referred to in the Agreed Statement of Facts (Rec., p. 12), would then likewise be entitled to the Government rate. Nor would there be reason for excluding the operating private steamship companies with which, as a matter of common knowledge, the Fleet Corporation contracts in allocating its vessels for passenger and freight service. To lessen the cost of doing business to any of these corporations is to lessen the ultimate charges against the public treasury.

When one considers the multitude of corporations and persons who may have such contracts with the Government that the extension to them of the Government rate for telegraphing would operate indirectly to the advantage of the Treasury, it becomes apparent that the rule of thumb suggested in the correspondence of 1873 with the Postmaster General can not be of universal application.

No such test is laid down in the statute itself upon which arises the question who are the "officers and agents" contemplated by it.

Without attempting to formulate a test of universal application, it may safely be stated that the officer or agent contemplated is first of all an individual, and secondly, an individual whose relationship to the Government Department is that of normal employment, as one on the military, naval or civil list. Corporations or even natural persons whose relationship to the Government depends upon contracts of other kinds, who are independent contractors, or separate legal entities controlled by stock ownership, and who do not telegraph on the Government credit but on their own, are not, it is submitted, the "officers and agents" contemplated by the Post Roads Act.

V. The Contract Between Respondent and the United States Effected by Respondent's Acceptance of the Post Roads Act Never Contemplated the Extension of Government Rates to Messages Sent by Such a Body As the Petitioner, or indeed to Any Messages Sent in Connection With Commercial Business Activities Carried on by the Government in Competition With Private Business.

The Fleet Corporation was engaged during the periods here in question as a carrier corporation, operating merchant ships in the commerce of the United States (Rec., p. 14).

The petitioner contends that no distinction is to be drawn between this activity and Government. Petitioner points out that the operation of merchant ships is an appropriate governmental function (brief, pp. 22 to 23), and cites Berizzi Brothers Company *vs.* S. S. Pesaro (271 U. S., 562), a case involving a merchant ship owned, possessed and operated for trade purposes by the Italian Government (Id., p. 24).

Granting that the United States Government might legally, if it had so elected, have engaged in the merchant shipping business, competing with private individuals in similar enterprises, this does not establish that the acceptance by the respondent of the benefits of the Post Roads Act would bind it to send the messages of the Government about this commercial business at the preferential Government rate.

The statute here in question is not merely a statute;

it is also an offer to contract, an offer which the Western Union accepted. It is well settled that the words of a contract are to be given the meaning which they would naturally and reasonably have had for parties of the sort concerned at the time and place and under the circumstances in which they were used.

Bell vs. *Bruen*, 1 How., 169, 187.
Chicago, Rock Island & Pacific Railway Company vs. *Denver & Rio Grande Railroad*, 146 U. S., 596, 609.
Merrian vs. *U. S.*, 107 U. S., 437, 441.
Barreda vs. *Silsbee*, 21 How., 146, 161.
Nash vs. *Towne*, 5 Wall., 689, 699.
Scott vs. *U. S.*, 12 Wall., 443, 444.
U. S. vs. *Gibbons*, 109 U. S., 200, 203.

In the *Nash* case, supra, this Court said:

> "Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. . . ."

In the *Scott* case the following language occurs:

> "In cases like this it is the duty of the court to assume the standpoint occupied by the parties when the contract was made—to let in the light of the surrounding circumstances—to see as the parties saw, and to think as they must have thought, in assenting to the stipulations by which they are bound. This process is always effective."

The rule is the same where the contract is with a state and is embodied in an act of a state legislature.

In *Tennessee* vs. *Whitworth*, 117 U. S., 129, at page 137, this Court said:

> "This brings us to an examination of the present charter to see what the legislature has expressed its intention of doing. 'The capital stock of said company' is exempt from taxation. That has been expressly enacted, and the owner or owners of the stock are necessarily relieved from all taxation on this account. The important question is, therefore, who are the owners of the capital stock of this corporation within the meaning of the term 'capital stock' as used in this charter, because, in construing statutes which are binding on States as contracts, the words employed are, if possible, to be given the same meaning they had in the minds of the parties to the contract when the statute was enacted. *In this respect there is no difference between a contract of a State and a contract of a natural person. If the words employed are capable of more than one meaning, that meaning is to be given them which, taking the whole statute together, it is apparent the parties intended they should have.*"
>
> 2 Williston on Contracts, Section 607.

And the same rule of construction was enunciated as applicable to Acts of Congress in *U. S.* vs. *Union Pacific Railroad Co.*, 91 U. S., 72. It is as true in this case as it was there that the statute "cannot be properly construed without reference to the circumstances which existed when it passed" (p. 79) and that "Congress acted with reference to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events" (p. 81).

As a matter of fact, it is a rule in the construction of statutes generally that the words of a statute are to be construed in reference to the circumstances surrounding its enactment and the history preceding that enactment.

Siemen's Administrator, vs. *Sellers*, 123 U. S., 276, 285.

Preston vs. *Brauder*, 1 Wheaton, 115, 121.

Aldridge vs. *Williams*, 3 How., 1, 241.

Smith vs. *Townsend*, 148 U. S., 490, 494.

Platt vs. *Union Pacific Railroad Company*, 98 U. S., 48, 64.

Holy Trinity Church vs. *U. S.*, 143 U. S., 457, 463.

The petitioner contends that the statute must be con
strued to apply not only to departments, bureaus, com
missions and the like governmental bodies in existenc
when the Act was passed, but also to those that may hav
come into existence since the Act was passed or that ma
come into existence in the future. The petitioner cite
the following cases in support of this contention:

Krichman vs. *U. S.*, 256 U. S., 363, 366.
Osborne vs. *City of Detroit*, 32 Fed., 36, 41.
White vs. *U. S.*, 191 U. S., 545, 552.
Shreveport vs. *Cole*, 129 U. S., 36, 47.
Fullerton, etc., Lumber Co. vs. *Northern Pacifi*
Ry. Co., 266 U. S., 435, 437.

In *Shreveport* vs. *Cole* it was alleged that a provision o
the Louisiana constitution impaired an antecedent contract
This Court said, in the course of its opinion denying Federa
Jurisdiction, that the Louisiana Supreme Court, in holdin
that the provision had prospective operation only, ha
followed the usual rule that constitutions and statute
are to be construed to operate prospectively only, unless
retrospective operation can not be avoided under the word
of the statute. Obviously, this statement of the Cour
has no application to the present case. There is in th
present case no question between retrospective and prospec
tive operation of the Post Roads Act. For the same reason
the White, Osborne and Fullerton cases are not in point
since the holdings therein are identical with those in th
Shreveport case.

Krichman vs. *U. S.* is more like the present case. Th
defendant therein was indicted and convicted for offering
a bribe to a person "acting for or on behalf of the United
States in an official function," the person being a baggag
porter of the Pennsylvania Railroad, the road being a
the time under Federal Control. The Court held that th
porter was not within the words of the Act.

> "The statute creating the offense was passed long
> before there was any thought of the Government

> taking over the railroads. That does not prevent its application if the thing done offends against it. It is, however, a circumstance proper to be considered in determining whether the situation is one intended to be dealt with by Congress."

It seems that if this case is pertinent at all to the present case, it is in respondent's favor. As in the Krichman case, the statute in the present case was passed along before there was any thought of the government engaging in the shipping business; and as in the Krichman case so in the present case that fact is pertinent for consideration in determining the scope of the duty of the Western Union under the Post Roads Act.

Applying the above rule of construction to the present statute or present contract, it seems clear that the duty of the Western Union should not be enlarged beyond that which it reasonably understood it was assuming when the statutory offer of the government was accepted. This does not mean that the benefits of the Act should not extend to new departments, bureaus and commissions and so on, or to *any* extension of governmental activity; but it seems to us that it should mean that the extensions of the activities of the United States government to fields not strictly governmental in character should not be held entitled to benefit from the statute, unless, as a matter of history, the government was engaged in such activity at the time of the acceptance of the Act by the Western Union. Such a construction, based on the historical situation when the Act was accepted, would take in such activities of the United States as the Post Office, which clearly is entitled to the benefit of the Post Roads Act, although it is a business, monopolized by the government.

A construction of this sort dividing off those activities of the government entitled to benefit from the Act from those not so entitled will be partly historical, and partly rational, but it will be in strict accord with the law of contracts. It will be fair to the respondent as imposing only the burden it reasonably contemplated in accepting the

offer; for it was certainly true in 1866 that the government was not engaged in business—except in the Post Office business, which stood on special historical and constitutional grounds—and it was not contemplated that the government would extend its activities into the business field. The construction will be fair to the government, as it will give the reduced rate and preferential service for all strictly governmental activity, and also for all activities not strictly governmental in character in which the government was engaged at the time the contract was made. It will likewise be fair to third persons, since it will avoid giving to the government in business special advantages not enjoyed by such third persons.

The contractual nature of the Post Roads Act is most important. It is ignored in the petitioner's brief. Unless it is kept in mind, there seems to be a difficulty, which petitioner's brief relies upon, in drawing a line between governmental and business activities of the United States government, whilst conceding to the Post Office Department, clearly a business, the benefit of the Act. It seems to the respondent that the contractual nature of the Post Roads Act should dominate the whole construction of the Act, which is the controlling question in this case. The arguments advanced by the petitioner in its brief, ignoring the contractual nature of the Post Roads Act, have been first dealt with in this brief, not because of their controlling importance but in order first to meet directly what the petitioner appears to rely upon.

VI. The Fleet Corporation Was Created to Separate Its Activities, Which Are Commercial, From Activities Governmental.

Again granting as above that the United States government might legally, if it had so elected, have engaged in the merchant shipping business, competing with private individuals and similar enterprises, another answer is that it chose not to do so.

The United States was willing to hold stock in a corporation

engaged in such activity, but not willing to engage in it in its own right. The Government itself created the Fleet Corporation for the very purpose of separating that commercial activity from the business of government.

Had this not been so, the respondent's argument here would be that the contract created by its acceptance of the Post Roads Act should not be so construed as to enable government-operated ship lines to enjoy telegraphic rates lower than competing lines privately owned.

There is a real distinction between government and business, even though the government may engage in business. Government has to do with the regulation and control of the conduct of people and with service to them. It is necessarily exclusive. There can not be competing governments, competing controls or public services as to the same subject-matter in reference to the same people.

But business is not necessarily exclusive. It may be competitive. It has to do with the persuasion of people voluntarily to trade.

The lines of demarcation may be broad, so broad as to admit of a twilight zone, but some cases will clearly fall in the sunny belt this side of the twilight and some as unmistakably in the dark belt beyond.

The operations of the Post Office Department partake somewhat of the nature of business, but it is under our system monopolistic, and thus removed from the ordinary business field. No competitor post-office is prejudiced by the extension of government rates to that Department.

Generally speaking, the preferential government rate ought not be extended to any business in which others than the government may engage, nor was it intended to be.

If a bureau of the Shipping Board, or of the War Department, should engage in the shipping business in competition with private persons in that business, it is clear that it *ought* not to have the government rate, although practical difficulties might arise in determining whether a given message was governmental business or commercial business, if the bureau were not separated in its functions by any plain line of

demarcation from other parts of the governmental establishment.

In this case the government itself through its legislative and executive branches has recognized the inappropriateness of having competitive business engaged in by a governmental bureau, and has split that activity off from itself by creating a stock company and buying the stock. All practical difficulties which might arise in segregating from the application of the Post Roads Act the telegraphing incident to this commercial activity, disappear as soon as it is judicially established that such a stock company is an entity separate from the government itself.

The agent of a department within the contemplation of the Post Roads Act was necessarily an individual carried on the payroll of the department and subject to supervision as to the details of his official conduct by the department head, or by an immediate superior responsible to the department head. The agents of the corporation set up by the government to carry on the commercial activity are, on the contrary, responsible to that corporation and not to the government, though the government may through stock ownership control them indirectly.

Since this separation of the Fleet Corporation's business from the other activities of the Shipping Board is an accomplished fact, it is perhaps not material whether it was done by legislative or executive action. The fact is, however, that the Fleet Corporation is not a mere creature of the Shipping Board, having only such powers as are delegated by the Shipping Board. Its own independent charter must be remembered (Rec., p. 26). And the Merchant Marine Act provided (Section 12) that it should

> "continue in existence and have authority to operate vessels, unless otherwise directed by law."

This same statute provided:

> "SEC. 35. That the power and authority vested in the board by this Act, except as herein otherwise specifically provided, may be exercised directly by the board, or by it through the United States Shipping Board Emergency Fleet Corporation."

Pursuant to this section, however, no strictly governmental power or authority was attempted to be vested in the Fleet Corporation at any time material in this suit. The resolution of September 30, 1921 (Rec., p. 30), allocating certain lines of activity to the Fleet Corporation, reserves to the Shipping Board itself the governmental functions granted by the Act, and confines its directions to the Fleet Corporation to commercial matters within the purpose of its creation.

So far as this case is concerned, the separation of commerce from government is therefore complete, and the commerce is committed to the separate corporate entity which sent and agreed to pay for the telegrams here in question.

VII. The Authoritative Cases Are Consistent With Respondent's Contentions.

The Lake Monroe (250 U. S., 246, 63 L. Ed., 962), decided June 2, 1919, was an application for a writ of prohibition to prevent the arrest of a ship operated by the Fleet Corporation for damages for a collision. The Fleet Corporation is referred to in general terms as "an operating agency" of the Shipping Board. The Lake Monroe had been requisitioned while in process of construction, completed by the Fleet Corporation, operated by it, documented in the name of the United States and assigned to Randall and Company as operating agents, and at the time of the collision was operating under a charter executed by them as agents of the Shipping Board to a private concern for the carrying of coal in coastwise commerce. This Court concluded:

> "Her service at the time was purely commercial, and she was subject by the terms of the act to the ordinary liability of a merchant vessel, notwithstanding the indirect interest of the government in the outcome of her voyage.
>
> "We deem it clear, also, that among the liabilities designated by the section is the liability of a merchant vessel to be subjected to judicial process in admiralty for the consequences of a collision."

United States *vs.* Strang (254 U. S., 491, 65 L. Ed., 368) came up on demurrer to an indictment charging a person with having unlawfully acted as agent of the United States in transacting business for the Fleet Corporation. Mr. Justice McREYNOLDS said:

> "The ultimate question for determination is whether the employment of defendant Strang as an inspector by the United States Shipping Board Emergency Fleet Corporation, without more, made him an agent of the government within the meaning of Sec. 41, Criminal Code."
>
> . . . . . .
>
> "Counsel for the government maintain that the Fleet Corporation is an agency or instrumentality of the United States, formed only as an arm for executing purely governmental powers and duties vested by Congress in the President, and by him delegated to it; that the acts of the Corporation within its delegated authority are the acts of the United States; that therefore, in placing orders with the Duval Company in behalf of the Fleet Corporation, while performing the duties as inspector, Strang necessarily acted as agent of the United States.
>
> "The demurrer was properly sustained.
>
> . . . . . .
>
> "The Corporation was controlled and managed by its own officers, and appointed its own servants and agents, who became directly responsible to it. Nothwithstanding all its stock was owned by the United States, it must be regarded as a separate entity. Its inspectors were not appointed by the President, nor by any officer designated by Congress; they were subject to removal by the Corporation only, and could contract only for it. In such circumstances we think they were not agents of the United States within the true intendment of Sec. 41.
>
> "Generally agents of a corporation are not agents of the stockholders, and can not contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation. Bank of United States *vs.* Planters' Bank, 9 Wheat., 904, 907, 908, 6 L. Ed., 244, 245; Bank of

Kentucky *vs.* Wister, 2 Pet., 318, 7 L. Ed., 437; Briscoe *vs.* Bank of Kentucky, 11 Pet., 257, 9 L. Ed., 709; Salas *vs.* United States, 148 C. C. A., 440, 234 Fed., 842."

Sloan Shipyards Corporation *vs.* U. S. S. B. E. Fleet Corporation and three other cases were decided together May 1, 1922 (258 U. S., 549, 66 L. Ed., 762). The Sloan Shipyards Corporation had filed a bill in equity to set aside a contract alleged to have been illegally extorted from it by the Fleet Corporation. The bill had been dismissed below upon the ground that it was against the Government, and that the suit being for more than $10,000 must be brought in the Court of Claims. This Court held the suit properly maintainable against the Fleet Corporation.

The suit of the Astoria Marine Iron Works, decided with the Sloan Shipyards case, was upon a contract with the Fleet Corporation, "a corporation organized and existing under the laws of the District of Columbia (hereinafter called the 'Corporation'), representing the United States of America, party of the second part." The contract recognized by its terms that the United States might exercise control over the furnishing of supplies to the contractor, and provided that if required by the Fleet Corporation "and/or the United States," the contractor would furnish schedules, etc. This Court held against the Fleet Corporation's contention that the remedy was in the Court of Claims, saying:

> "The whole frame of the instrument seems to us plainly to recognize the Corporation as the immediate party to the contract. The distinction between it and the United States is marked in the phrase last quoted. If we are right in this, further reasoning seems to us unnecessary to show that there was jurisdiction of the suit. The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States. The judgment in this case also must be reversed."

In the third case decided under the title of Sloan Shipyards Corporation, that of the Eastern Shore Shipbuilding Corporation, Bankrupt, the Court said:

> "It was asserted against the estate of the Eastern Shore Shipbuilding Corporation, in the district court for the southern district of New York, under a contract similar to that last described, made by that company with the Fleet Corporation, 'representing the United States of America,' to construct six harbor tugs. The claim was presented by the Fleet Corporation in its own name, but was put forward by it as an instrumentality of the government of the United States. It was denied successively by the referee, the district court, and the circuit court of appeals, on the ground that the Fleet Corporation was a distinct entity, and that, whatever might be the law as to a direct claim of the United States, the Fleet Corporation stood like other creditors and was not to be preferred. 274 Fed., 893. The considerations that have been stated apply even more obviously to this case. The order is affirmed."

In the cases in the district courts reversed in the Sloan Shipyards and the Astoria Marine Iron Works cases (268 Fed., 624, and 270 Fed., 635), will be found those arguments based upon some expressions of the court in the Lake Monroe case to the effect that the Fleet Corporation is but "an arm of the Board" which is "an arm of the Government," which are put forward in the case at bar on behalf of the petitioner. The case in this group which was affirmed by this Court, that of Eastern Shore Shipbuilding Corporation, Bankrupt (274 Fed., 893, 899), is consistent with the contentions of the respondent here.

United States vs. Walter (263 U. S., 15, 68 L. Ed., 137), has been relied on by petitioner for the reason that the third count of the indictment in that case was upheld upon the ground that—

> "while it is true that the corporation is not the United States (United States vs. Strang, 254 U. S., 491, 65 L. Ed., 368, 41 Sup. Ct. Rep., 165), the contemplated fraud upon the corporation, if successful, would have

> resulted directly in a pecuniary loss to the United States, and even more immediately would have impaired the efficiency of its very important instrument. We are of opinion that it was within the words of Sec. 37, 'defraud the United States in any manner,' and that on this as on the other point, the decision below was wrong. Haas *vs.* Henkel, 216 U. S., 479, 480, 54 L. Ed., 577, 578, 30 Sup. Ct. Rep., 249, 17 Ann. Cas., 1112; United States *vs.* Barnow, 239 U. S., 74, 79, 60 L. Ed., 155, 157, 36 Sup. Ct. Rep., 19."

We respectfully submit that this holding does not rest upon any fiction of identity of the corporation with its stockholder, the government. In concluding that a loss to the corporation would result directly in loss to the United States, the court merely applied a principle as old and familiar as the principle that a stockholder has an insurable interest in the property of a corporation, as to which see Riggs *vs.* Commercial Mutual Insurance Company (125 N. Y., 7), decided in 1890, and 26 C. J., 24, and numerous cases cited under note 53. In concluding that the impairment of the efficiency of the Fleet Corporation should be construed as an element in the crime of defrauding the United States "in any manner," the cases cited show what the court had in mind. Haas *vs.* Henkel is the Cotton Leak case where the result of the conspiracy would have been the obtaining in advance of information concerning government reports, and would have resulted in no loss whatsoever to the government, but only in depriving the reports of their value to the public. It appears to be true that the opinion as to the third count of the indictment ascribes a liberal instead of a strict meaning to the phrase "defrauding the United States in any manner," in a criminal statute; but that does not help the petitioner in its effort to establish that the Fleet Corporation is the United States.

The first and second counts of the indictment in the Walter case were based on Section 35 of the Criminal Code

as amended October 23, 1918 (40 Stats. at Large, 1015), as follows:

> "Whoever shall make . . . to . . . any person or officer in the civil, military or naval service of the United States, *or any department thereof, or any corporation in which the United States of America is a stockholder*, any claim upon or against the Government of the United States, or any department or officer thereof, *or any corporation in which the United States of America is a stockholder, knowing*," etc. . . .

The italicized phrases were added by the amendment of 1918, showing a clear recognition by Congress of the fact that such a corporation as the petitioner was not a part of the government nor a Department of the government.

When we contrast the phraseology of this statute as amended with the phraseology of the statute which is under consideration in the case at bar, the Post-Roads Act of 1866 granting reduced rate telegraphing to the "several departments of the government and their officers and agents," it is evident that the language of the Act of 1918 above quoted furnishes an additional and persuasive argument for the respondent herein—the argument of *Expressio Unius*.

U. S. ex rel. Skinner and Eddy Corporation vs. McCarl (72 L. Ed., Advance Sheets, 13), decided October 10, 1927, has been quoted from before. This case seems conclusive against any contention that the corporate treasury of the Fleet Corporation is to be confused with the United States Treasury, or that the liabilities of the Fleet Corporation are debts in which the United States has a (legal) interest as debtor.

Since the decision of this court in the Sloan Shipyards cases, there has been uniformity of holding by the Circuit Courts of Appeals that the Fleet Corporation is liable for torts and breaches of contract as are other private corporations.

> Providence Engineering Corporation vs. Downey Shipbuilding Corporation, 294 Fed., 641 (C. C. A., 2).

Dietrich *vs.* U. S. S. B. Emergency Fleet Corporation, 9 Fed. (2d), 733 (C. C. A., 2).

U. S. S. B. Emergency Fleet Corporation *vs.* Banque Russo-Asiatique London, 286 Fed., 918 (C. C. A., 3).

U. S. S. B. Emergency Fleet Corporation *vs.* Texas Star Flour Mills, 12 Fed. (2d), 9 (C. C. A., 5).

Cohn *vs.* United States Shipping Board et al., 20 Fed. (2d), 56, (C. C. A., 6).

U. S. S. B. Emergency Fleet Corporation *vs.* Rosenberg Bros. & Co., 12 Fed. (2d), 721 (C. C. A., 9).

And in the State courts:

Cox *vs.* Lykes Bros., 237 N. Y., 376, 143 N. E., 226.

Haynes *vs.* Lone Star Shipbuilding Co., 268 Pa., 92, 110 Atl., 788.

VIII. Telegraphic Rates When Established Have the Force of Law, and a Telegraph Company's Alleged Agreement, Express or Implied, Can Not Prevail Against the Legal Rate.

In the statement by the petitioner (brief, p. 8), is set out the fact that the Government rate was allowed by the respondent to the Fleet Corporation until May 23, 1922, at which time it is emphasized that it was first denied.

Considerable space is given also to the enumeration of the various governmental and quasi-governmental organizations to which the rate has been extended, including the petitioner.

It is stipulated in this connection that these extensions of the Government rate and priority were "permitted" by the telegraph company "upon application for the said Government rate made by them or on their behalf, as a matter of course, and without litigation in the courts or other final determination of the legality of the claims for Government rate" (Rec., p. 19).

Perhaps by inadvertence, or by reason of the unimportance of the telegraphing of some of these organizations, mistakes have been made and the Government rate extended to bodies which were not entitled to it.

Even so, such a course of dealing on the part of the telegraph company can hardly be claimed to amount to a contract binding, or purporting to bind, the telegraph company to continue to accord these organizations the Government rate forever.

As a matter of law, however, even by express acquiescence or solemn agreement on the part of the respondent, the legal rate applicable to the messages of the Fleet Corporation could not be set aside and the preferential rate substituted. Irrespective of its past conduct or its present wishes, the respondent is legally bound to apply the ordinary commercial rate to the petitioner's messages, if the petitioner is what is purports to be, a corporation engaged in commerce, and as such engaged in active competition with others engaged in like commerce who pay full rates for their telegrams.

Since 1910 telegraphic rates have not been a matter of private contract, but have the force of law. See Western Union Telegraph Company vs. Esteve Brothers and Company (256 U. S., 566, 65 L. Ed., 1094) a case in which a message was not written when filed for transmission upon the usual telegraphic blank specifying the classes of service and limitations of liability. This court said:

> "The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons. . . . Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. . . . Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all. . . ."

IX. Even Assuming the Fleet Corporation to be a Government Department, Which this Court Has Said it is not, Some Messages Here Involved Were Not "Between" it and Another, and Therefore Not Within the Statute.

It is set out in paragraph 8 of the agreed statement (Rec., p. 7), that of the messages involved (1) some were

messages between it and its agents or between it and some branch of the government, and (2) some were messages between it and its agents, on the one hand, and persons or corporations not its agents or those of any branch of the government, on the other hand. The amount of the tolls calculated at commercial and government rates on each of these classes of messages separately is set out in the agreed statement.

It appears obvious that a telegram from a Department of the government or its agent to an outsider, or from an outsider to a Department or its agent, is not a telegram "*between* the several Departments of the government and their officers and agents." The statute contemplates a message the origin and destination of which shall both be governmental.

Attorney General WILLIAMS under date of July 10, 1873, in an opinion to the Postmaster General upon this statute (14 Opinions, Attorney General, 278, 279, 280), said:

> "I think that the word 'between' in said section should be taken distributively, as applying to communications between, first, one Department and another; second, a Department and its officers and agents; third, a Department and the officers and agents of another Department; fourth, the officers and agents of the same Department; and, fifth, the officers and agents of one and those of another Department. This construction is, in my judgment, in conformity with the reason of the statute."
>
> . . . . . .
>
> "My opinion, therefore, is that the Departments, their officers and agents, may interchangeably telegraph each other, as hereinbefore stated, upon official business, subject only to the limitation that the telegraphing must be in cases where the rates are payable out of public moneys, or are to be accounted for to the Government by the officer making the expenditures."

Therefore, irrespective of the court's view upon the principal question in the case, recovery should in any event be had for the difference between the government rate and the commercial rate upon the messages passing between the Fleet Corporation and persons outside of the government;

this even upon the assumption that the Fleet Corporation is a Department of the government.

The petitioner admits that if the statute were to be construed *de novo*, this claim of respondent would have force. It is a fact, however, that the present case is the first one, excepting the Philippine Bank case above referred to, in which this statute has been before the courts for construction. The question is, therefore, unembarrassed by any prior decisions. The petitioner refers to the same opinion of the Attorney General, which is quoted above, as laying down a rule of law which has been for many years accepted. (Brief, p. 30.) The opinion seems consistent only with our position in this matter.

On the merits, the petitioner's argument seems to be solely that the purpose of the statute was to save money for the public treasury, and inasmuch as more money would be saved by assuming that the statute read "to or from" instead of "between," it should be so construed. (Id., pp. 30-31.)

What the practice has been does not appear in the record, contrary to petitioner's assumption about this. It is obvious that if the Government rate were to be extended to such corporations as the petitioner, it would be all the more vital for the telegraph company to protect itself by insisting that no messages not strictly within the statute as to both origin and destination shall be sent at the preferential rate. Indeed, as we have heretofore pointed out (p. 43), if the law does not *require* the government rate to be applied, the telegraph company is obliged to collect the regular rate, and no amount of past practice, whether mistaken or intentional, can vary its obligation. (Western Union vs. Esteve Bros., supra, p. 44).

It is respectfully submitted that the judgment of the court below was correct and should be affirmed.

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